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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

v.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

As the case comes here on certificate, there is no opinion by the Circuit Court of Appeals. The decision of the District Court has not been reported.

JURISDICTION

Jurisdiction is conferred upon this Court by Section 239, Judicial Code, as amended by the Act of February 13, 1925.

QUESTION CERTIFIED

Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L., Chap. 521, page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?

THE STATUTE

Sections 1 and 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., Title 18, Secs. 724, 725), provide:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.
>
> While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make

restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

The facts in this case are set out in the certificate on page 1 as follows:

On October 22, [illegible], in the District Court of the United States for the District of

Nebraska, defendant in error plead guilty to certain violations of the national prohibition act. On October 25, 1926, he was sentenced under said plea of guilty to a term of three months imprisonment in the Douglas County jail at Omaha, Nebraska. On the 25th day of October, 1926, he was delivered by the United States marshal, in pursuance of said judgment and sentence, to the jail keeper, and on said date he commenced serving his sentence. On October 26, 1926, and during the same term of court, the court entered an order placing the defendant in error on probation, said order in part reading as follows:

"Ordered and adjudged, that said defendant, Glen Murray, be placed on probation for the period of two (2) years, under the personal supervision of Robert P. Samardick, who is hereby appointed and constituted probation officer in this case."

Defendant in error was thereupon released and placed in charge of said Robert P. Samardick.

It is the contention of the Government that probation could not be granted by the District Court after defendant in error commenced serving his sentence.

SUMMARY OF ARGUMENT

The case is not moot. It seems that if the probation order is void the defendant may be recommitted; but if this be not so, there is still substance to the case, as its decision will determine whether continued supervision and partial restraint under probation must be continued until 1928.

The Probation Act does not confer upon the District Courts the power to release a defendant on probation after he has commenced to serve his sentence, and the exercise of such power is contrary to established rules of procedure and is in contravention of the clear meaning of the statute and the purpose for which it was passed.

Prior to the enactment of the Probation Act the Federal courts had long observed the well-known rule of law which prohibits a sentence from being set aside or altered after the defendant enters upon the execution of a valid sentence, even during the term at which the sentence is imposed. As the Probation Act contains no provision which would modify this rule, it applies here and is of itself sufficient to prevent the District Court from releasing the defendant on probation.

The wording of the statute is in harmony with the rule just referred to, for although there is no definite expression as to time given, the language used actually confines the time when a person may be placed on probation to the period between conviction and commitment. The language of the statute also gives effect to its purpose, which, according to the report of the House Judiciary Committee (House Report No. 1377, 68th Congress, 2nd Sess., p. 2), is to provide a system of probation in the Federal District Courts and thereby give "an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment." As the report points out, the Act is the direct result of the decision of this Court in *Ex parte United States,* 242 U. S. 27, holding that a Federal court had no power to suspend a sentence, and is complementary to the Parole Act and other existing laws which were inadequate to meet the situation.

All the decisions rendered by the Circuit Courts of Appeals, and all others by District Courts except one, which touch on the question presented here, support the contention of the Government or are consistent with it, and these Federal decisions are in accord with State cases arising in States where the probation laws are similar to the Federal statute.

ARGUMENT

I

THE CASE IS NOT MOOT

At the threshold of this case we are confronted with a question as to whether the case may not be moot in the Circuit Court of Appeals. The certificate shows that the defendant was sentenced on October 25, 1926, to a term of three months' imprisonment. The record in the Circuit Court of Appeals shows that in the judgment it was provided that the sentence should run from October 25, 1926. Defendant entered the jail and began to serve his sentence on October 25, 1926. On October 26th he was released on an order issued by the District Judge placing him on probation for two years in the custody of a probation officer, and he has continuously since remained under the control of that officer. The period of his sentence, if computed from the date set by the District Court, October 25, 1926, has long since expired. However, the law seems to be that a date mentioned in the sentence as the time when that sentence is to begin is not, strictly speaking, a part of the sentence. *Bernstein* v. *United States,* 254 Fed. 967 (certiorari denied, 249 U. S. 604).

The case is clearly not moot if the defendant may be recommitted to the penitentiary to serve the remainder of the jail sentence imposed because the order for probation was void. To sanction such recommitment, it must be assumed that the defendant's sentence having been interrupted by a void order and he having been at large in a void probationary custody, he may be recommitted under the doctrine of "constructive escape." The authorities on that subject are by no means uniform. The line of demarcation between them is discussed in the case of *Morgan* v. *Adams,* 226 Fed. 719, where the Circuit Court of Appeals for the Eighth Circuit said (p. 721):

> It is sufficient to say that the conclusion forced upon our minds is that, if the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the

> sentence stands, and is enforceable by the court at any time after its rendition, either before or after the term of the court, *until the convict has suffered the penalties it imposes.* (Italics ours.)

The following comment from *State* v. *Abbott*, 87 S. C. 466, 473, is pertinent:

> The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape *and by other causes,* but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. No more can the delay due to the release of the convict under a void order of the Court attempting to suspend the sentence be so counted. The sentence is satisfied, not by the lapse of time after it is pronounced, *but by the actual suffering of the imprisonment imposed by it.* The rule is that jurisdiction remains in a Court to enforce its valid judgments according to law against those who are parties to them * * *. * * * The following cases hold that, as the attempt to suspend was of no effect, the sentence is not satisfied until it has been actually suffered. *Neal* v. *State* (Ga.), 30 S. E. 858; *Gray* v. *State* (Ind.), 8 N. E. 16; *Miller* v. *Evans*, 91 Am. St. 143 (Iowa); *State* v. *Cockerham*, 24 N. C. 204. (Italics ours.)

In *Steere* v. *Field*, Fed. Cas. No. 13350 (2 Mason 486), Justice Story, on circuit, considered the doctrine of constructive escape in deciding whether at common law it constituted an escape for the "gaoler" to allow prisoners the liberty of all the compartments within the jail walls. After an exhaustive review of historical authorities, which he said he "felt necessary, because there is a diversity of opinion among American judges, as to what the common law on this subject is," Justice Story applied the test whether in each case the prisoner is "kept in salva et arcta custodia." He decided that the giving a prisoner free access to all compartments within the prison walls was not a constructive escape, since that would still be safe and close custody, but that to give the prisoner the keys of the institution and the position of assistant custodian did constitute a constructive escape.

If the order releasing Murray on probation was void, then it follows that the restraint imposed upon him by the probation officer in execution of said order was also void. As a consequence, the prisoner would be deemed to have been "at large"; the doctrine of constructive escape would apply to the period since October 26th, and his prison sentence would be considered as having been interrupted during the time he was released under the void probation order, so that now he could be returned to suffer the penalties his original valid sentence imposed.

In the case of *Anderson* v. *Corall*, 263 U. S. 193, it is said (p. 196):

> Mere lapse of time *without imprisonment or other restraint contemplated by the law* does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. *Dolan's Case*, 101 Mass. 219, 222; *Petition of Moebus*, 73 N. H. 350, 352. (Italics ours.)

But in deciding whether the case is moot it may not be necessary to decide whether the defendant may be recommitted. Even upon the assumption that the doctrine of constructive escape may not be invoked herein so as to return Murray to the penitentiary to serve the balance of the sentence, it would still seem that enough substance remains in this litigation to justify a reply by this Court to the question brought here by the certificate. The prisoner is still under restraint and is required to report at intervals to the probation officer, who is an agent of the court. From time to time this officer expends money in performing the duties of supervision over the prisoner. If the order for probation is void, this supervision should cease. Substantial rights of the prisoner are also involved in determining the validity of the District Court's order. Under the terms of the probation he can be arrested without a warrant by the probation officer, be brought before the court and tried without a jury, and a substantial fine or commitment to jail imposed, and it is within the power of the court to extend such supervision over him for a period of five years from October 26th. By the express terms of the order of probation the Government has responsibility for this prisoner until October 26, 1928. If the order of probation is void, then the prisoner should either be freed and the Government's responsibility over him cease or he should be recommitted to jail.

II

THE LIMITATION ON THE POWER OF A FEDERAL COURT TO ALTER A SENTENCE AFTER EXECUTION HAS COMMENCED HAS NOT BEEN CHANGED BY THE PROBATION ACT

Prior to the passage of this Act, the law was well settled that the courts' power of control over defendants *ended* at the hour of commitment. The general rule, long observed by both the State and Federal courts, is stated by the Circuit Court of Appeals for the Eighth Circuit in *Stewart* v. *United States*, 300 Fed. 769, decided June 12, 1924 (p. 777):

> An examination of the authorities leaves no doubt that the established rule is that courts have the jurisdiction and authority, during the term at which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, *until or unless they have been executed in whole or in part,* or the rights of third parties will be injured by such action, and cases in which pleas of nolo contendere have been filed and

> accepted by the court are not exceptions to this rule. (Italics ours.)

This rule was also discussed by the Circuit Court of Appeals for the Second Circuit in *United States v. Howe*, 280 Fed. 815, which held (p. 819):

> * * * while a court has, as a general rule, power over its judgments during the term, its power over them is clearly subject to certain restrictions. Thus it has been held that, after a sentence has been pronounced, but before the final judgment has been signed, the court may change the sentence. * * * *Ex parte Lange* itself clearly indicates one of such restrictions. And another restriction is that *if a sentence has been put into operation, and the person sentenced to imprisonment has been actually committed to prison and commenced to serve his term, the power of the court to alter or amend the sentence is gone.* (Italics ours.)

In *Ex parte Lange*, 18 Wall. 163, which is referred to in the above decision, this Court held that a second judgment could not be rendered even during the same term or when the first was erroneous if the sentence was partially executed.

The Probation Act has enlarged the powers of the courts in regard to the disposition of defendants, but, as its wording indicates, this grant of power is to be executed only "after conviction or after a plea of guilty," which plainly is just an enlargement of the courts' range of discretion in sentencing, and not a shift of the courts' authority beyond the ancient natural limit. To give the latter construction to the Act would be to impute to Congress an intent to create a region of overlapping authority between the courts and the executive. Such a construction is unnecessary to the effectiveness of the Probation Act and it is unlikely that Congress intended to create a period during which both executive and the courts could deal with defendants.

There must be a definite limit to the power of the judiciary, and it is a part of our law that this limit be placed at the prison door. The line of demarcation between the judicial and executive branches of the Government is very well stated in the following excerpt from *Miller* v. *Snook*, 15 F. (2d) 68, 69:

> * * * Discretion is given the courts in fixing punishment before execution begins, but after *execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive.* The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case, unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.
>
> Considering our frame of government, it would seem that the power of the court

> should logically end when the prisoner passes into the custody and control of the executive under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence. (Italics ours.)

With this division of powers between the judiciary and the executive so well established as a part of our law it is unreasonable to hold that the Probation Act, with no provisions inconsistent with this division of powers, has worked a change in this respect and was intended to confer authority on the courts to exercise powers which have heretofore been considered executive in their nature. Such a construction would raise a serious constitutional question. In regard to this, when a similar question arose in *Archer* v. *Snook*, 10 F. (2d) 567, it was said (p. 568):

> * * * The limitations on the power of the court to alter a sentence, even during the term, when it has gone into execution, are well recognized. See 12 Cyc. 783; *In re Lange*, 18 Wall. 163, 21 L. Ed. 872. The interference by a judge with a closed sentence, after the prisoner has been delivered in execution to the executive authority, is at least

so close to an exercise of the pardoning power, which is held to include commutations and conditional pardons (*United States* v. *Wilson*, 7 Pet. 150, 8 L. Ed. 640; *In re Wells*, 18 How. 307, 15 L. Ed. 421), that it should not be attempted, unless on the clearest legislative warrant.

Plainly Congress intended in the Probation Act to confer upon the courts enlarged discretionary powers to weigh the interests of society and the defendant in the imposition of punishment, but supplementary to and not intrusive upon the executive's power to pardon or parole.

III

NEITHER THE LANGUAGE OF THE PROBATION ACT WHEN CONSIDERED AS A WHOLE NOR THE DECLARED PURPOSE OF CONGRESS IN PASSING IT IS CONSISTENT WITH THE GRANTING OF PROBATION AFTER COMMITMENT

(A) *Consideration of the Language of the Statute*

Although the Probation Act does not contain a definite expression as to the length of time after conviction in which courts may grant probation, the language used plainly indicates that the courts' powers do not extend beyond the time of commitment. Section 1 of the Act provides that "after conviction or after a plea of guilty or nolo contendere" the court shall have power "to suspend the imposition or execution of sentence and to place the defendant upon probation." The language of this provision forestalls the contention that the Act contains no terms limiting the time, for the words used are in themselves a limitation.

However, the District Court has apparently construed the statute as if it read "the court shall have power to suspend the execution of the whole sentence or a part thereof." There is no reason for reading such provision into the law, and there is, in fact, good reason to believe that Congress purposely omitted all references to the whole or part of the sentences. It is a matter of record that the New York Probation Law was one of the laws studied by Congress in drafting the Federal Law. (House Report No. 1377, p. 3, 68th Congress, 2nd Sess.) At that time the New York law did contain a provision for suspending execution of the whole or a part of the judgment. Such provision was apparently the source of much confusion and the cause of an amendment in 1920 providing "that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, N. Y. Criminal Code, 1924.) The amendment really nullified the effect of the provision referred to above, and in 1925, but after the Federal law was passed, the New York law was amended to omit such references entirely. It seems safe to assume that Congress did consider these provisions which were then in the law and deliberately left them out of the Federal law.

Therefore, in the absence of any qualifying words, we contend that the word "sentence" is to be taken as a unit, and that probation must be granted before any part of the prison sentence is executed. The Government's view is expressed by the District Court of Kansas in *Mouse v. United States*, 14 F. (2d) 202, 203:

> Does this language mean the further execution of a sentence being served may be suspended at any time before the same has been fully performed? If so, then all convicts may, at any time during the period of the term of confinement in prison, make the application.
>
> I am forced to the conclusion this view of the act is not that expressed or intended by the Congress; on the contrary, that the suspension of the imposition or execution of sentence as by Congress intended was *applicable to that period between conviction and the beginning of the execution of sentence*, at which the court has retained jurisdiction over the cause and the power to change or modify its judgment of conviction, and that it was not the view of the law-making power the Probation Act in question should permit the court to invade the penal institutions of the country at any time during the term of imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. (Italics ours.)

The language used in other portions of the Act also supports this view. The following alternative clauses, which appear in Section 1 of the Act, imply that Congress is not authorized to make partial execution of a prison sentence a condition of probation:

> That the courts * * * shall have power * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * * or *the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* (Italics ours.)

In commenting on these alternative clauses the District Court for the Northern District of Georgia in *Archer* v. *Snook, supra*, said (p. 569):

> This broad language might have been considered sufficient to permit making the payment of a fine or the suffering of an imprisonment one of the conditions of the probation. But that such was not the meaning of Congress appears from the immediately following words: Or "may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid.*" This makes it clear that probation "*in the manner aforesaid*" could not have included the payment of a fine. Much less could it include an imprisonment, to prevent which, in proper cases, was the main object of the law. Succeeding sentences of the law mention a variety of things which may be required of the probationer, but imprisonment is not among them. It may come only on revoking the probation. The court, therefore, after ascertainment of guilt, must, with no other

> delays than have heretofore been permissible, either suspend sentence and establish probation, which may, if unsuccessful, be revoked and sentence then pronounced, or may pronounce the sentence ordinarily appropriate to the offense, but before it goes into execution may suspend it, and establish in lieu of it probation, subject to revocation and execution of the sentence later. It may, by express provision of the act, in any probation, make the payment of a fine a condition of it, but in none may it make imprisonment under the sentence such. It can not, therefore, impose an imprisonment sentence, and provide for its suspension and for probation after it is partly executed. This applicant, therefore, can not have his discharge on the attempt to provide therefor in this sentence, but must place his case before the parole board.

If the statute prohibits a court, as is indicated in these alternative clauses, from making a partial execution of a prison sentence a condition of probation, it can hardly be urged that the courts are allowed to accomplish the same result by deferring the announcement of probation until after the sentence has been partially executed.

The statute contains still another reference which is of assistance in determining the time when probation may be granted. The power to impose a fine and to grant probation contained in one of the alternative clauses quoted above is given without any definite expression as to the time these powers may be exercised, but it seems clear that Congress intended the fine and probation to be given simultaneously, as is indicated in the following provision; also in Section 1:

> While on probation the defendant may be required to pay in one or several sums *a fine imposed at the time of being placed on probation* * * *. (Italics ours.)

The language of the foregoing provisions precludes the Act from being construed to apply to persons already incarcerated.

(B) *The Purpose of Congress in Passing the Probation Act*

In a memorandum prepared by the National Probation Association and attached to the report of the House Judiciary Committee when the bill was presented in its final form (House Report No. 1377, 68th Congress, 2nd Sess., p. 2), the purpose of the Act is stated as follows:

> The purpose of this bill is to provide a system for the use of probation in the United States district courts in line with statutes now in effect in a large majority of the States. * * *
>
> Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders *without the hardship, the expense, and the risk of subjecting them to imprisonment.* * * *
>
> * * * It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no

mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. In many such cases probation is not only the humane but the practical and effective treatment, *avoiding the disgrace and stigma of a prison sentence.* * * *

Before the decision of the United States Supreme Court in the so-called Killits case, rendered in December, 1916 (Ex parte U. S. Petitioner, No. 11, original), the United States district courts suspended sentence in many instances * * *.

As a result of the decision of the Supreme Court bills for this purpose have been introduced in Congress at each session since. * * *

The United States district courts, unlike nearly all State courts, have to-day absolutely no legal power to suspend sentence or use probation. * * * In extreme cases of children and young first offenders, where removing them from a good home and sending them to a penal institution seems unnecessarily drastic, and where a fine can not be paid, certain judges now adjourn these cases for an indefinite period, requiring them to report at stated times to an officer of the court. * * *

The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the

> parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence, and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier *to reclaim an unhardened early offender without commitment to a prison than after it.* The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases. * * * (Italics ours.)
>
> This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work. Its principal provisions are as follows:
>
> SECTION 1. *Suspension of sentence and placing on probation.*—The United States courts of original jurisdiction are authorized to suspend sentence and place offenders on probation in all cases except those punishable by death or life imprisonment. * * *

The foregoing indicates clearly that Congress when enacting this statute had in mind defendants who had not yet been committed, and that it intended the Probation Act to be complementary to the Parole Act, which was inadequate to meet the situation. Therefore, to hold that the Probation Act was designed to give relief to prisoners is to deny the true purpose of the Act, for as it was said in *Archer* v. *Snook, supra* (p. 568):

By their incarceration, the shame, stigma, and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished.

IV

THERE IS NO CONFLICT OF DECISIONS ON THE QUESTION OF ALLOWING THE RELEASE OF A PRISONER ON PROBATION AFTER HE HAS COMMENCED TO SERVE HIS SENTENCE

All of the decisions of the Federal courts, except the instant case and one other in a District Court, which touch on the question presented here, are either in support of the Government's contention or are consistent with it. None of the decisions rendered by Circuit Courts of Appeals are opposed to the Government's views.

Nix v. *James*, 7 F. (2d) 590, decided by the Circuit Court of Appeals for the Ninth Circuit on August 3, 1925, was the first reported case arising under this statute and does not touch on the point raised here, except indirectly in the following statements (pp. 593, 594):

> In other words, defendants sentenced at terms * * * prior to March 4, 1925, and *who have not yet been imprisoned*, may come within the mischiefs which Congress intended to remedy * * *.
>
> * * * * *
>
> Nothing contained in this opinion must be construed as holding that the Probation Act has any application to a defendant who has entered on the service of his term of imprisonment. (Italics ours.)

In *Kriebel* v. *United States*, 10 F. (2d) 762, the Circuit Court of Appeals for the Seventh Circuit stated that the question of whether the Probation Act was applicable to a defendant who had begun the service of his term of imprisonment was not before it.

In *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F. (2d) 64, the Circuit Court of Appeals for the Sixth Circuit explained that the record did not show whether the defendant had begun to serve his sentence, but the court said (p. 65):

> We think that jurisdiction to grant probation exists, even as to convictions made and affirmed before March 4, 1925, at least at any time before the execution of the sentence is begun * * *.

In *Ackerson* v. *United States*, 15 F. (2d) 268, the Circuit Court of Appeals for the Second Circuit said (p. 269):

> It is held to be reasonably clear that Congress did intend to permit persons convicted of crime to apply for the benefit of the statute ***at any time before actually entering upon the performance of the sentence or judgment of the trial court*** * * *. (Italics ours.)

In *United States* v. *Cook*, 19 F. (2d) 826, now pending in this Court on petition for certiorari, Docket No. 539, the question presented is similar to the one raised here with the added feature that the term of court had ended in that case before the

District Court granted probation. The Circuit Court of Appeals for the Fifth Circuit held that the lower court was without authority to release the defendant after the service of his sentence had begun. In explaining that Congress had, before the passage of the Probation Act, enacted the parole and good-time statutes, the court said (p. 828):

> In view of the existence of those statutes, and of the *absence from the Probation Act of any reference to them, or to the subject of releasing from imprisonment persons who have already begun to serve sentences imposed*, the conclusion is warranted that the lawmakers did not intend the Probation Act to empower the courts mentioned to make such an order as the one now in question.
>
> If the Probation Act authorized the making of such an order, each court exercising the power granted may, as to any imprisoned convict, set at naught the limitations and restrictions of the parole and commutation statutes, leaving the system established by those statutes in force only so far as each of the courts mentioned, in the exercise of an unrestricted discretion, may permit it to remain in force. (Italics ours.)

There are six reported decisions by District Courts involving the question presented here. Five of these take the view advanced by the Government in this brief, and are therefore not in accord with the unreported ruling in the instant case. In the sixth, *United States* v. *Chafina*, 14 F. (2d) 622, the

District Court for Arizona placed the defendant on probation after she had served about sixteen months of her sentence. The court said (p. 623):

> It is suggested that the exercise of this power by the court would be in conflict with the Parole Act. Assume that to be true. Congress passed both Acts. It could modify or repeal the Parole Act at its pleasure. The Probation Act was passed subsequent to the passage of the Parole Act and clearly vests this discretionary power in the court, as no limitation of time after which the court may not admit to probation is expressed in the act.

In regard to the repeal of prior laws and in reply to the statement in the *Chafina Case*, the District Court for the Western District of Arkansas said in *Davis* v. *United States*, 15 F. (2d) 697, 700:

> The statement that Congress may modify or repeal the Parole Act at its pleasure is true. There is in the Probation Act no express repeal or modification of the Parole Act. Implied repeals are not favored. If Congress had desired the Probation Act to repeal or modify the Parole Act, or to give to the District Court authority to release a defendant confined in a United States penitentiary outside of the territorial jurisdiction of the court and after the expiration of the term at which the defendant was convicted, it seems to me that Congress would have so stated in express terms.

In the *Davis Case* the defendant's petition was denied on two grounds, one of which was that he was already serving his sentence and therefore ineligible for probation. In three of the four remaining cases—*Archer* v. *Snook, supra; Mouse* v. *United States, supra;* and *United States v. Young*, 17 F. (2d) 129—the defendants had also commenced to serve their sentences, and all were denied probation for that reason. In *United States* v. *Davis*, 19 F. (2d) 536, decided by the District Court for Idaho, the defendant had not yet been committed, and the court stated that, in view of that fact, it still had power to grant probation.

Decisions of the New York State courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. (See Report of the House Judiciary Committee, *supra.*) The provisions of the New York law in effect at the time the Federal statute was enacted are, in part:

> A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure. * * * Provided, however, that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced. (Sec. 2188, Criminal Code, 1924.)

In *People ex rel. Paris* v. *Hunt*, 201 App. Div. 573, affirmed in 234 N. Y. 558, it was held that the reference relative to the "whole or a part of the judgment" did not give the court power to interfere with a defendant's sentence after execution had commenced. In that case the Supreme Court of Washington County gave the defendant an indeterminate sentence with a minimum of two and one-half years, but ordered that he be produced in court after a year's service for final disposition. In regard to this order the Appellate Division of the Supreme Court made the following statement, which was later approved by the Court of Appeals (p. 575):

> Under the record here it must be held that at the time the sentence was imposed and before the imprisonment began there was no modification of this judgment affecting the term of imprisonment imposed, and that any other disposition which could be made in the County Court of Bronx county on producing the defendant there would be a disposition modifying the judgment at that time, after the imprisonment had commenced. Such action, we think, is forbidden by the amendment.

A review of other State decisions also indicates that where the laws are similar to the Federal statute the decisions lend support to the view advanced herein by the Government.

In *State* v. *Ensign*, 38 Idaho, 539, the defendant was released by the district court from jail when he had served only about one-half of his six months' sentence. The court tried to justify its action under Section 9041 of the Compiled Statutes of Idaho, which relates to the suspension of sentences and which contains provisions similar in most respects to the Federal Probation Law. In reviewing this matter the Supreme Court of Idaho said (p. 544):

> The court, while clothed with jurisdiction, did not exercise its discretion to suspend the execution of judgment or withhold judgment on such terms and for such time as it might prescribe, but made and entered its final judgment, and after its jurisdiction ceased erroneously sought to exercise the power of the board of pardons.

The Montana Probation Law, Secs. 12078–85, Rev. Codes of 1921, also contains provisions very similar to the Federal Act and in addition, as an aid in clarifying the meaning of the statute, it provides, in regard to revoking the probation, that "In all cases of such termination of probation the original sentence shall be considered as beginning upon the first day of imprisonment in the institution." (Sec. 12084.) In *State ex rel. Reid* v. *District Court*, 68 Mont. 309, the defendant was released by the district court eight days after he was committed to the county jail to serve a six months' sentence. The district court assumed to act under the Probation Law, but the Supreme Court of Montana, in passing on this case held that it had exceeded its jurisdiction and had encroached upon the powers of the executive. This portion of the decision was reaffirmed in *State ex rel Bottomly* v. *District Court*, 73 Mont. 541, in which the court said (p. 544):

> Independently of other considerations, it is apparent from these provisions that it was the intention of the lawmakers that any order suspending the execution of a sentence should be made before the defendant is committed to the institution wherein his term of imprisonment would have been served but for the order, and to this extent counsel agree.

In *State ex rel. Zabel* v. *Municipal Court of Milwaukee County*, 179 Wis. 195, involving the construction of a State statute almost identical in terms with the Federal Probation Act, the trial court granted probation while the case was pending in the Supreme Court of Wisconsin. The latter court, holding that the trial court had no authority to grant probation, said (p. 2[illegible]):

> It will be seen that the statute does not prescribe the time during which the power of the court to "suspend the judgment or stay the execution thereof and place the defendent on probation" is to be exercised. In view of the prevailing rule, independent of statute, that the court has no power to revise its judgment or sentence after the

> term, or after it has become the judgment and sentence of this court, *the language to be found in section 57.01 cannot be construed as indicative of a legislative purpose to authorize an exercise of the power at a time when, under the ordinary powers of the court, it could not revise its judgment or sentence in a criminal case.* Such a legislative purpose should be expressed in clear and definite language. The purpose of the statute was to confer a new power upon the court—the power to suspend the execution of the sentence and place the defendant on probation. *It was not the purpose of the statute to enlarge the time within which a court might revise a judgment or sentence in a criminal case.* (Italics ours.)

CONCLUSION

We find no provision in the Probation Act which authorizes a District Court to release a defendant on probation after he has commenced to serve his jail sentence, and we submit that it was not the purpose of Congress to confer powers in regard to persons already incarcerated which have not been exercised heretofore by the courts and which are forbidden by established rules of procedure. There is no conflict among the Circuit Courts of Appeals which have passed on the point presented here and we think their interpretation of the statute, which would prevent the release of the defendant in the instant case, is the correct one.

The question submitted by the Circuit Court of Appeals for the Eighth Circuit should be answered in the negative.

Respectfully submitted.

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October, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 394

THE UNITED STATES OF AMERICA

v.

GLEN MURRAY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 539

FREDERICK A. COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

In No. 394, *The United States* v. *Glen Murray*, the decision of the District Court is unreported and there is no opinion of the Circuit Court of Appeals, as the case came here on certificate. In No. 539, *Frederick A. Cook* v. *The United States*, the opinion of the District Court (R. 17) is unreported, and the opinion of the Circuit Court of Appeals (R. 51) appears in 19 F. (2d) 826.

JURISDICTION

No. 394, the *Murray Case*, came here on certificate, under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. On October 27, 1927, this Court ordered that the entire record in this cause be certified to it so that the whole matter in controversy might be considered. (R. 111.)

In No. 539, the *Cook Case*, the judgment of the Circuit Court of Appeals was entered June 14, 1927. (R. 55.) On September 12, 1927, petition for certiorari was filed under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The writ was granted October 31, 1927. (R. 56.)

Both cases reached the Circuit Court of Appeals on writs of error sued out by the United States to review orders of the U. S. District Court granting probation. Sec. 128(a), Judicial Code (U. S. C., Title 28, Sec. 225); *Stroheim* v. *Deimel*, 77 Fed. 802; *Crooker* v. *Knudsen*, 232 Fed. 857; *United States* v. *New York Central & H. R. R. Co.*, 164 Fed. 324; *United States* v. *Dunne*, 173 Fed. 254, 257.

QUESTIONS PRESENTED

In the *Murray Case* the question is:

Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, known as the Probation Act, during the term at which sentence was imposed, but after he had commenced to serve the sentence, to make the order placing defendant in error upon probation?

In the *Cook Case* the question is whether the District Court had power to make such an order after the expiration of the term of court at which the mandate of the Circuit Court of Appeals was received, and after service of sentence was commenced.

THE STATUTE

Sections 1 and 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., Title 18, Secs. 724, 725), provide:

> SEC. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together

with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

The record in the *Murray Case* discloses that on October 22, 1926, in the District Court of the United States for the District of Nebraska, defendant in error pleaded guilty to certain violations of the National Prohibition Act. On October 25, 1926, he was sentenced under the plea of guilty to a term of three months' imprisonment in the Douglas County jail at Omaha, Nebraska. On the 25th day of October, 1926, he was delivered by the United States marshal, in pursuance of the judgment and sentence, to the jail keeper, and on that date he commenced serving his sentence. On October 26, 1926, and during the same term of court, the court entered an order placing the defendant in error on probation. (R. 5–7.)

Defendant in error was thereupon released and placed on probation.

It does not appear that any probation proceedings had been instituted or were pending before Murray was committed or prior to October 26th. The United States sued out a writ of error.

In the *Cook Case* petitioner was convicted on November 21, 1923, in the District Court for the Northern District of Texas on a charge of violating Section 215 of the Penal Code (U. S. C., Title 18, Sec. 338), and was sentenced to serve 14 years and 9 months in the Leavenworth Penitentiary, and to pay a fine of $12,000. (R. 1, 5.) Conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit in February, 1925, and in April of

1925 petitioner was taken from the Tarrant County Jail, where he had been incarcerated pending his appeal, and committed to the Federal Penitentiary at Leavenworth. (R. 2.) In February of 1927 petitioner filed an application in the District Court for probation. (R. 1-4.) The District Court, assuming to act under authority of the Probation Act of March 4, 1925, granted the application on March 17, 1927, ordered that the petitioner be placed on probation for a period of five years, and suspended execution of both the imprisonment and the fine. (R. 7-8.) The order of the District Court was later reversed by the Circuit Court of Appeals, where the case was taken on writ of error. (R. 55-56.) Petitioner now seeks further review of his case on writ of certiorari issued by this Court.

SPECIFICATION OF ERROR IN MURRAY CASE

The United States District Court erred in holding that it had authority to grant probation after Murray had been committed and had entered upon the service of his prison sentence and erred accordingly in granting probation. (R. 8.)

SUMMARY OF ARGUMENT

The *Murray Case* is not moot. If the probation order in the latter case is void, it seems that the defendant may be recommitted; but if this be not so, there is still substance to the case, as its decision will determine whether continued supervision and partial restraint under probation must be continued until 1928.

The Probation Act does not confer upon the District Courts the power to release a defendant on probation after he has commenced to serve his sentence, and the exercise of such power is contrary to established rules of procedure and is in contravention of the clear meaning of the statute and the purpose for which it was passed.

Prior to the enactment of the Probation Act the Federal courts had long observed the well-known rule of law which prohibits a valid sentence from being set aside or altered, even during the term at which it is imposed, after the defendant enters upon the service of it. As the Probation Act contains no provision which would modify this rule, it applies here and is of itself sufficient to prevent the District Court from releasing the defendant on probation.

The wording of the statute is in harmony with the rule just referred to, for although there is no definite expression as to time given, the language used actually confines the time when a person may be placed on probation to the period between conviction and commitment. The language of the statute also gives effect to its purpose, which, according to the report of the House Judiciary Committee (House Report No. 1377, 68th Congress, 2d Sess., p. 2), is to provide a system of probation in the Federal District Courts and thereby give "an opportunity to reform to certain offenders without the hardship, the expense, and the risk of subjecting them to imprisonment." As the report points out, the Act is the direct result of the decision of this Court in *Ex parte United States*, 242 U. S. 27, holding that a Federal court had no power to suspend a sentence, and is complementary to the Parole Act and other existing laws which were inadequate to meet the situation, and should not be construed to cover the same field to any extent.

All the decisions rendered by the Circuit Courts of Appeals, and all others by District Courts except in the instant cases and one other, which touch on the questions here presented, support the contention of the Government or are consistent with it, and these Federal decisions are in accord with State cases arising in States where the probation laws are similar to the Federal statute.

The fact that the term has expired, at which sentence was imposed or mandate of an appellate court filed, may not deprive the court of power to grant probation, provided the service of sentence has not commenced and the convicted person is still in the custody of the court awaiting commitment and execution of his sentence.

ARGUMENT

I

THE MURRAY CASE IS NOT MOOT

There is no question as to the *Cook Case* being a proper one for the consideration of this Court, but at the threshold of the *Murray Case* we are confronted with a question as to whether the latter may not be moot in the Circuit Court of Appeals. The record shows that the defendant was sentenced on October 25, 1926, to a term of three months' imprisonment. In the judgment it was provided that the sentence should run from October 25, 1926. (R. 5.) Defendant entered the jail and began to serve his sentence on October 25, 1926. On October 26th he was released on an order issued that day by the District Judge placing him on probation for two years in the custody of a probation officer, and he has continuously since remained under the control of that officer. The period of his sentence, if computed from the date set by the District Court, October 25, 1926, has long since expired, but the law seems to be that a date mentioned in the sentence as the time when that sentence is to begin is not, strictly speaking, a part of the sentence. *Bernstein* v. *United States,* 254 Fed. 967 (certiorari denied, 249 U. S. 604).

The case is not moot if the defendant may be recommitted to jail to serve the remainder of the sentence imposed because the order for probation was void. To sanction such recommitment it must be assumed that as the defendant's sentence was interrupted by a void order, and he has been at large in a void probationary custody, he may be recommitted under the doctrine of "constructive escape." The authorities on that subject are by no means uniform. The line of demarcation between them is discussed in the case of *Morgan* v. *Adams,* 226 Fed. 719, where the Circuit Court of Appeals for the Eighth Circuit said (p. 721):

> * * * it is sufficient to say that the conclusion forced upon our minds is that, if the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the sentence stands, and is enforceable by the court at any time after its rendition, either before or after the term of the court, *until the convict has suffered the penalties it imposes.* (Italics ours.)

The following comment from *State* v. *Abbott*, 87 S. C. 466, 473, is pertinent:

> The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape *and by other causes*, but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. No more can the delay due to the release of the convict under a void order of the Court attempting to suspend the sentence be so counted. The sentence is satisfied, not by the lapse of time after it is pronounced, *but by the actual suffering of the imprisonment imposed by it.* The rule is that jurisdiction remains in a Court to enforce its valid judgments according to law against those who are parties to them * * *. The follow-

> ing cases hold that, as the attempt to suspend was of no effect, the sentence is not satisfied until it has been actually suffered. *Neal* v. *State* (Ga.), 30 S. E. 858; *Gray* v. *State* (Ind.), 8 N. E. 16; *Miller* v. *Evans,* 91 Am. St. 143 (Iowa); *State* v. *Cockerham,* 24 N. C. 204. (Italics ours.)

In *Steere* v. *Field,* Fed. Cas. No. 13350 (2 Mason, 486), Justice Story, on circuit, considered the doctrine of constructive escape in deciding whether at common law it constituted an escape for the "gaoler" to allow prisoners the liberty of all the compartments within the jail walls. After an exhaustive review of historical authorities, which he said he "felt necessary, because there is a diversity of opinion among American judges, as to what the common law on this subject is," Justice Story applied the test whether in each case the prisoner is "kept *in salva et arcta custodia.*" He decided that giving a prisoner free access to all compartments within the prison walls was not a constructive escape, since that would still be safe and close custody, but that giving the prisoner the keys of the institution and the position of assistant custodian did constitute a constructive escape.

If the order releasing Murray on probation was void, then it follows that the restraint imposed upon him by the probation officer in execution of said order was also void. As a consequence the prisoner would be deemed to have been "at large"; the doctrine of constructive escape would apply to the period since October 26th and his prison sentence would be considered as having been interrupted during the time he was released under the void probation order so that now he could be returned to suffer the penalties his original valid sentence imposed.

In the case of *Anderson* v. *Corall*, 263 U. S. 193, it is said (p. 196):

> Mere lapse of time *without imprisonment or other restraint contemplated by the law* does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. *Dolan's Case*, 101 Mass. 219, 222; *Petition of Moebus*, 73 N. H. 350, 352. (Italics ours.)

But in deciding whether the case is moot it may not be necessary to decide whether the defendant may be recommitted. Even upon the assumption that the doctrine of constructive escape may not be invoked herein so as to return Murray to jail to serve the balance of the sentence, it would still seem that enough substance remains in this litigation to justify a decision of the case by this Court. The prisoner is still under the restraint of probation and is required to report at intervals to the probation officer, who is an agent of the court. From time to time this officer expends money in performing the duties of supervision over the prisoner. If the order for probation is void, this supervision should cease. Substantial rights of the prisoner are also involved in determining the validity of the District Court's order. If he violates the terms of the probation he may be arrested without a warrant by the probation officer, and be brought before the court who can revoke the probation and can give him "any sentence which might originally have been imposed," or the court can extend such supervision over him for a period of five years from October 26th. By the express terms of the order of probation the Government has responsibility for this prisoner until October 26, 1928. If the order of probation is void, then the prisoner should either be freed and the Government's responsibility over him cease or he should be recommitted to jail.

II

THE LIMITATION ON THE POWER OF A FEDERAL COURT TO ALTER A SENTENCE AFTER EXECUTION HAS COMMENCED HAS NOT BEEN CHANGED BY THE PROBATION ACT

Prior to the passage of this Act, the law was well settled that the courts' power of control over defendants ended at the hour of commitment. The general rule, long observed by both the State and Federal courts, is stated by the Circuit Court of Appeals for the Eighth Circuit in *Stewart* v. *United States*, 300 Fed. 769, decided June 12, 1924 (p. 777):

> An examination of the authorities leaves no doubt that the established rule is that

> courts have the jurisdiction and authority, during the term at which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, *until or unless they have been executed in whole or in part*, or the rights of third parties will be injured by such action, and cases in which pleas of nolo contendere have been filed and accepted by the court are not exceptions to this rule. (Italics ours.)

This rule was also discussed by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Howe*, 280 Fed. 815, which held (p. 819):

> * * * while a court has, as a general rule, power over its judgments during the term, its power over them is clearly subject to certain restrictions. Thus it has been held that, after a sentence has been pronounced, but before the final judgment has been signed, the court may change the sentence. * * * *Ex parte Lange* itself clearly indicates one of such restrictions. And another restriction is that if a sentence has been put into operation, and the person sentenced to imprisonment has been actually committed to prison and commenced to serve his term, the power of the court to alter or amend the sentence is gone.

In *Ex parte Lange*, 18 Wall. 163, cited in the above decision, this Court held that a second judgment could not be rendered even during the same term or when the first was erroneous if the sentence was partially executed.

The Probation Act has enlarged the powers of the courts in regard to the disposition of defendants, but, as its wording indicates, this grant of power is to be executed only "after conviction or after a plea of guilty," which plainly is just an enlargement of the courts' range of discretion in sentencing, and not a shift of the courts' authority beyond the ancient natural limit. To give the latter construction to the Act would be to impute to Congress an intent to create a region of overlapping authority between the courts and the executive. Such a construction is unnecessary to the effectiveness of the Probation Act, and it is unlikely that Congress intended to create a period during which both the executive and the courts could deal with defendants.

There must be a definite limit to the power of the judiciary, and it is a part of our law that this limit be placed at the prison door. The line of demarcation between the judicial and executive branches of the Government is very well stated in the following excerpt from *Miller* v. *Snook*, 15 F. (2d) 68, 69:

> * * * Discretion is given the courts in fixing punishment before execution begins, but after execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive. The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case,

> unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.
>
> Considering our frame of government, it would seem that the power of the court should logically end when the prisoner passes into the custody and control of the executive under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence.

With this division of powers between the judiciary and the executive so well established as a part of our law, it is unreasonable to hold that the Probation Act, with no provisions inconsistent with this division of powers, has worked a change in this respect and was intended to confer authority on the courts to exercise powers which have heretofore been considered executive in their nature. Such a construction would raise a serious constitutional question. In regard to this, when a similar question arose in *Archer* v. *Snook*, 10 F. (2d) 567, it was said (p. 568):

> The limitations on the power of the court to alter a sentence, even during the term, when it has gone into execution, are well recognized. See 12 Cyc. 783; *In re Lange*, 18 Wall. 163, 21 L. Ed. 872. The interference by a judge with a closed sentence, after the prisoner has been delivered in execution to the executive authority, is at least so close to an exercise of the pardoning power, which is held to include commutations and conditional pardons (*United States* v. *Wilson*, 7 Pet. 150, 8 L. Ed. 640; *In re Wells*, 18 How. 307, 15 L. Ed. 421), that it should not be attempted, unless on the clearest legislative warrant.

Plainly Congress intended in the Probation Act to confer upon the courts enlarged discretionary powers to weigh the interests of society and the defendant in the imposition of punishment, but supplementary to and not intrusive upon the executive's power to pardon or parole.

III

NEITHER THE LANGUAGE OF THE PROBATION ACT WHEN CONSIDERED AS A WHOLE NOR THE DECLARED PURPOSE OF CONGRESS IN PASSING IT IS CONSISTENT WITH THE GRANTING OF PROBATION AFTER COMMITMENT

(*A*) *Consideration of the Language of the Statute*

Although the Probation Act does not contain a definite expression as to the length of time after conviction in which a court may grant probation, the language used plainly indicates that the power does not extend beyond the time of commitment. Section 1 of the Act provides that "after conviction or after a plea of guilty or nolo contendere" the court shall have power "to suspend the imposition or execution of sentence and to place the defendant upon probation." The language of this provision forestalls the contention that the Act contains no terms limiting the time, for the words used are in themselves a limitation.

In both of these cases the District Courts have apparently construed the statute as if it read "the court shall have power to suspend the execution of the whole sentence or a part thereof." There is no reason for reading such a provision into the law, and there is, in fact, good reason to believe that Congress purposely omitted all references to the whole or part of the sentences. It is a matter of record that the New York Probation Law was one of the laws studied by Congress in drafting the Federal law. (House Report No. 1377, 68th Congress, 2d Sess., p. 3.) At that time the New York law did contain a provision for suspending execution of the whole or a part of the judgment. Such provision was apparently the source of much confusion and the cause of an amendment in 1920 providing "that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, N. Y. Criminal Code, 1924.) The amendment really nullified the effect of the provision referred to above, and in 1925, but after the Federal law was passed, the New York law was amended to omit such references entirely. It seems safe to assume that Congress did consider these provisions, which were then in the law, and deliberately left them out of the Federal law.

Therefore, in the absence of any qualifying words, we contend that the word "sentence" is to be taken as a unit and that probation must be granted before any part of the prison sentence is executed. The Government's view is expressed by the District Court of Kansas in ***Mouse* v. *United States*,** 14 F. (2d) 202, 203:

> Does this language mean the further execution of a sentence being served may be suspended at any time before the same has been fully performed? If so, then all convicts may, at any time during the period of the term of confinement in prison, make the application.
>
> I am forced to the conclusion this view of the act is not that expressed or intended by the Congress; on the contrary, that the suspension of the imposition or execution of sentence as by Congress intended was ***applicable to that period between conviction and the beginning of the execution of sentence,*** at which the court has retained jurisdiction over the cause and the power to change or modify its judgment of conviction, and that it was not the view of the lawmaking power the Probation Act in question should permit the court to invade the penal institutions of the country at any time during the term of

> imprisonment, and after all jurisdiction over the subject matter and the person of the offender has been lost. (Italics ours.)

The language used in other portions of the Act also supports this view. The following alternative clauses, which appear in Section 1 of the Act, imply that Congress is not authorized to make partial execution of a prison sentence a condition of probation:

> That the courts * * * shall have power * * * to suspend the imposition or execution of sentence and to place the defendant upon probation * * * or *the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* (Italics ours.)

In commenting on these alternative clauses the District Court for the Northern District of Georgia in *Archer* v. *Snook, supra,* said (p. 569):

> This broad language might have been considered sufficient to permit making the payment of a fine or the suffering of an imprisonment one of the conditions of the probation. But that such was not the meaning of Congress appears from the immediately following words: Or "may impose a fine and may *also* place the defendant upon probation *in the manner aforesaid.*" This makes it clear that probation "*in the manner aforesaid*" could not have included the payment of a fine. Much less could it include an imprisonment, to prevent which, in proper cases, was the main object of the law. Suc-

> ceeding sentences of the law mention a variety of things which may be required of the probationer, but imprisonment is not among them. It may come only on revoking the probation. The court, therefore, after ascertainment of guilt, must, with no other delays than have heretofore been permissible, either suspend sentence and establish probation, which may, if unsuccessful, be revoked and sentence then pronounced, or may pronounce the sentence ordinarily appropriate to the offense, but before it goes into execution may suspend it, and establish in lieu of it probation, subject to revocation and execution of the sentence later. It may, by express provision of the act, in any probation, make the payment of a fine a condition of it, but in none may it make imprisonment under the sentence such. It can not, therefore, impose an imprisonment sentence, and provide for its suspension and for probation after it is partly executed. This applicant, therefore, can not have his discharge on the attempt to provide therefor in this sentence, but must place his case before the parole board.

If the statute prohibits a court, as is indicated in these alternative clauses, from making a partial execution of a prison sentence a condition of probation, it can hardly be urged that a court is allowed to accomplish the same result by deferring the announcement of probation until after the sentence has been partially executed.

The statute contains still another reference which is of assistance in determining the time when probation may be granted. The power to impose a fine and to grant probation contained in one of the alternative clauses quoted above is given without any definite expression as to the time these powers may be exercised; but it seems clear that Congress intended the fine and probation to be given simultaneously, as is indicated in the following provision, also in Section 1:

> While on probation the defendant may be required to pay in one or several sums *a fine imposed at the time of being placed on probation* * * *. (Italics ours.)

The language of the foregoing provisions precludes the Act from being construed to apply to persons already incarcerated.

(B) The Purpose of Congress in Passing the Probation Act

In a memorandum prepared by the National Probation Association and attached to the report of the House Judiciary Committee when the bill was presented in its final form (House Report No. 1377, 68th Congress, 2d Sess., p. 2), the purpose of the Act is stated as follows:

> The purpose of this bill is to provide a system for the use of probation in the United States district courts in line with statutes now in effect in a large majority of the States. * * *
>
> Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders *without the hard-*

ship, the expense, and the risk of subjecting them to imprisonment. * * *

* * * It frequently happens that the same or a similar offense is committed by a hardened repeater who is deserving of no mercy at the hands of the court, and by a young boy, a first offender who has been led into crime by evil associates or bad environment, who after his detention and trial is thoroughly repentant and capable of becoming an upright citizen if extended a helping hand upon his release. In many such cases probation is not only the humane but the practical and effective treatment, *avoiding the disgrace and stigma of a prison sentence.* * * *

Before the decision of the United States Supreme Court in the so-called Killits case, rendered in December, 1916 (Ex parte U. S. Petitioner, No. 11, original), the United States district courts suspended sentence in many instances * * *.

As a result of the decision of the Supreme Court bills for this purpose have been introduced in Congress at each session since. * * *

The United States district courts, unlike nearly all State courts, have to-day absolutely no legal power to suspend sentence or use probation. * * * In extreme cases of children and young first offenders, where removing them from a good home and sending them to a penal institutiton seems unnecessarily drastic, and where a fine can not be paid, certain judges now adjourn these

> cases for an indefinite period, requiring them to report at stated times to an officer of the court. * * *
>
> The parole laws and pardoning power of the President are not adequate to meet the need for a probation system. Under the parole law the defendant must be committed and serve at least one-third of the sentence in full. This usually means six months' sentence, and always means the branding of the delinquent as a convict and taking him away from his environment and associates in disgrace. The result of long experience with the probation system shows that it is far easier *to reclaim an unhardened early offender without commitment to a prison than after it.* The presidential power of pardon is subject to the same criticism and can naturally only be exercised in special cases. * * * (Italics ours.)
>
> This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work. Its principal provisions are as follows:
>
> SECTION 1. *Suspension of sentence and placing on probation.*—The United States courts of original jurisdiction are authorized to suspend sentence and place offenders on probation in all cases except those punishable by death or life imprisonment. * * *

This shows that Congress when enacting this statute had in mind defendants who had not yet been committed, and that it intended the Probation Act to be complementary to the Parole Act, which was inadequate to meet the situation. Therefore, to hold that the Probation Act was designed to give relief to prisoners is to deny the true purpose of the Act, for as it was said in *Archer* v. *Snook, supra*, (p. 568):

> By their incarceration, the shame, stigma, and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished.

IV

THE DECISIONS ON THE QUESTION OF ALLOWING THE RELEASE OF A PRISONER ON PROBATION AFTER HE HAS COMMENCED TO SERVE HIS SENTENCE SUPPORT THE CONTENTION OF THE UNITED STATES

All of the decisions of the Federal courts, except those of the United States District Courts in these cases and one other in a District Court, touching on the question presented here, are either in support of the Government's contention or are consistent with it. None of the decisions rendered by Circuit Courts of Appeals are opposed to the Government's views.

Nix v. *James*, 7 F. (2d) 590, decided by the Circuit Court of Appeals for the Ninth Circuit on August 3, 1925, was the first reported case arising under this statute and does not touch on the point raised here, except indirectly in the following statements (pp. 593, 594):

> In other words, defendants sentenced at terms * * * prior to March 4, 1925, and who have not yet been imprisoned, may come

> within the mischiefs which Congress intended to remedy * * *.
>
> * * * * *
>
> Nothing contained in this opinion must be construed as holding that the Probation Act has any application to a defendant who has entered on the service of his term of imprisonment.

In *Kriebel* v. *United States*, 10 F. (2d) 762, the Circuit Court of Appeals for the Seventh Circuit stated that the question whether the Probation Act was applicable to a defendant who had begun the service of his term of imprisonment was not before it.

In *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F (2d) 64, the Circuit Court of Appeals for the Sixth Circuit explained that the record did not show whether the defendant had begun to serve his sentence, but the court said (p. 65):

> We think that jurisdiction to grant probation exists, even as to convictions made and affirmed before March 4, 1925, at least at any time before the execution of the sentence is begun * * *.

In *Ackerson* v. *United States*, 15 F. (2d) 268, the Circuit Court of Appeals for the Second Circuit said (p. 269):

> It is held to be reasonably clear that Congress did intend to permit persons convicted of crime to apply for the benefit of the statute at any time before actually entering upon the performance of the sentence or judgment of the trial court * * *.

There are six reported decisions by District Courts involving the questions presented here. Five of these take the view advanced by the Government in this brief. In the sixth, *United States* v. *Chafina*, 14 F. (2d) 622, the District Court for Arizona placed the defendant on probation after she had served about sixteen months of her sentence. The court said (p. 623):

> It is suggested that the exercise of this power by the court would be in conflict with the Parole Act. Assume that to be true. Congress passed both Acts. It could modify or repeal the Parole Act at its pleasure. The Probation Act was passed subsequent to the passage of the Parole Act and clearly vests this discretionary power in the court, as no limitation of time after which the court may not admit to probation is expressed in the act.

In regard to the repeal of prior laws and in reply to the statement in the *Chafina Case*, the District Court for the Western District of Arkansas said in *Davis* v. *United States*, 15 F. (2d) 697, 700:

> The statement that Congress may modify or repeal the Parole Act at its pleasure is true. There is in the Probation Act no express repeal or modification of the Parole Act. Implied repeals are not favored. If Congress had desired the Probation Act to repeal or modify the Parole Act, or to give to the District Court authority to release a defendant confined in a United States penitentiary outside of the territorial jurisdic-

> tion of the court and after the expiration of the term at which the defendant was convicted, it seems to me that Congress would have so stated in express terms.

In the *Davis Case* the defendant's petition was denied on the grounds that the term of court at which the sentence was imposed had passed and that he was already serving his sentence in Leavenworth Penitentiary. In three of the four remaining cases—*Archer* v. *Snook, supra; Mouse* v. *United States, supra;* and *United States* v. *Young,* 17 F. (2d) 129—the defendants had also commenced to serve their sentences, and all were denied probation for that reason. In *United States* v. *Davis,* 19 F. (2d) 536, decided by the District Court for Idaho, the defendant had not yet been committed, and the court stated that, in view of that fact, it still had power to grant probation.

Decisions of the New York State courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. (See Report of the House Judiciary Committee, *supra.*) The provisions of the New York law in effect at the time the Federal statute was enacted are, in part:

> A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure. * * * Provided, however,

> that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced. (Sec. 2188, Criminal Code, 1924.)

In *People ex rel. Paris* v. *Hunt*, 201 App. Div. 573, affirmed in 234 N. Y. 558, it was held that the reference relative to the "whole or a part of the judgment" did not give the court power to interfere with a defendant's sentence after execution had commenced. In that case the Supreme Court of Washington County gave the defendant an indeterminate sentence with a minimum of two and one-half years, but ordered that he be produced in court after a year's service for final disposition. In regard to this order the Appellate Division of the Supreme Court made the following statement, which was later approved by the Court of Appeals (p. 575):

> Under the record here it must be held that at the time the sentence was imposed and before the imprisonment began there was no modification of this judgment affecting the term of imprisonment imposed, and that any other disposition which could be made in the County Court of Bronx county on producing the defendant there would be a disposition modifying the judgment at that time, after the imprisonment had commenced. Such action, we think, is forbidden by the amendment.

A review of other State decisions also indicates that where the laws are similar to the Federal statute the decisions lend support to the view advanced herein by the Government.

In *State* v. *Ensign*, 38 Idaho 539, the defendant was released by the district court from jail when he had served only about one-half of his six months' sentence. The court tried to justify its action under Section 9041 of the Compiled Statutes of Idaho, which relates to the suspension of sentences and which contains provisions similar in most respects to the Federal Probation Law. In reviewing this matter the Supreme Court of Idaho said (p. 544):

> The court, while clothed with jurisdiction, did not exercise its discretion to suspend the execution of judgment or withhold judgment on such terms and for such time as it might prescribe, but made and entered its final judgment, and after its jurisdiction ceased erroneously sought to exercise the power of the board of pardons.

The Montana Probation Law, Secs. 12078–85, Rev. Codes of 1921, also contains provisions very similar to the Federal Act and in addition, as an aid in clarifying the meaning of the statute, it provides, in regard to revoking the probation, that "In all cases of such termination of probation the original sentence shall be considered as beginning upon the first day of imprisonment in the institution." (Sec. 12084.) In *State ex rel. Reid* v. *District Court*, 68 Mont. 309, the defendant was released by the district court eight days after he was committed to the county jail to serve a six months' sentence. The district court assumed to act under the Probation Law, but the Supreme Court of Montana, in passing on this case held that it had exceeded its jurisdiction and had encroached upon the powers of the executive. This portion of the decision was reaffirmed in *State ex rel. Bottomly* v. *District Court*, 73 Mont. 541, in which the court said (p. 544):

> Independently of other considerations, it is apparent from these provisions that it was the intention of the law makers that any order suspending the execution of a sentence should be made before the defendant is committed to the institution wherein his term of imprisonment would have been served but for the order, and to this extent counsel agree.

In *State ex rel. Zabel* v. *Municipal Court of Milwaukee County*, 179 Wis. 195, involving the construction of a State statute almost identical in terms with the Federal Probation Act, the trial court granted probation while the case was pending in the Supreme Court of Wisconsin. The latter court, holding that the trial court had no authority to grant probation, said (p. 200):

> It will be seen that the statute does not prescribe the time during which the power of the court to "suspend the judgment or stay the execution thereof and place the defendant on probation" is to be exercised. In view of the prevailing rule, independent of statute, that the court has no power to revise

> its judgment or sentence after the term, or after it has become the judgment and sentence of this court, *the language to be found in section 57.01 can not be construed as indicative of a legislative purpose to authorize an exercise of the power at a time when, under the ordinary powers of the court, it could not revise its judgment or sentence in a criminal case.* Such a legislative purpose should be expressed in clear and definite language. The purpose of the statute was to confer a new power upon the court—the power to suspend the execution of the sentence and place the defendant on probation. *It was not the purpose of the statute to enlarge the time within which a court might revise a judgment or sentence in a criminal case.* (Italics ours.)

V

THE EXPIRATION OF THE TERM AT WHICH SENTENCE WAS IMPOSED OR MANDATE OF APPELLATE COURT RECEIVED MAY NOT DEPRIVE THE DISTRICT COURT OF POWER TO GRANT PROBATION, PROVIDED THE CONVICT HAS NOT BEEN COMMITTED

In each of these cases the prisoner had been committed and had entered upon the service of his sentence before probation was granted. Murray had been in jail only one day and Cook had been in the penitentiary nearly two years before probation was granted, but the principle is the same in either case. There is one feature of the *Cook Case* which is not present in the *Murray Case* which deserves some comment.

In the *Murray Case*, although the prisoner had been committed, the term at which his sentence was imposed had not expired.

In the *Cook Case*, after judgment, the case was taken on writ of error to the Circuit Court of Appeals, which affirmed the conviction. The term of the District Court at which its judgment was entered had expired and the term of that court during which the mandate of the Circuit Court of Appeals was received and entered had expired before probation was granted.

Some decisions deal with the effect of the expiration of the term at which judgment was entered on the power of the District Court to grant probation, in connection with the rule stated in *United States* v. *Mayer*, 235 U. S. 55, that ordinarily a court may not alter its judgment after the expiration of the term unless steps to that end have been commenced during the term. *Nix* v. *James*, 7 F. (2d) 590, C. C. A., 9th Circuit; *Kriebel* v. *United States*, 10 F. (2d) 762, C. C. A., 7th Circuit; *Evans* v. *District Judge of the United States for the Western District of Tennessee*, 12 F. (2d) 64, C. C. A., 6th Circuit; *Ackerson* v. *United States*, 15 F. (2d) 268, C. C. A., 2d Circuit, all hold that, if granting probation be considered the alteration or modification of a judgment, the rule that a judgment may not be modified after the expiration of the term does not operate to prevent the granting of probation after such term has expired, where a writ of error has been sued out by the convicted person, execution of whose sentence is postponed pending the appeal, and that the Probation Act has modified the old rule respecting the powers of the District Courts to the extent of allowing them to grant probation after affirmance of a conviction by an appellate court, even though the term of the District Court at which the judgment was entered has expired, provided the convict has not begun the service of the sentence and action is taken after the mandate is received and before commitment. The rule announced in these decisions seems to be in accordance with the purpose and spirit of the Probation Act, and these decisions have been accepted by the United States as containing a correct statement of the law. No doubt in all of them the probation was granted during the term at which the mandate of the appellate court was received and entered, while in the *Cook Case* that term had expired, but it is not apparent that any distinction in principle is to be made for that reason.

We see no reason to urge that Congress may not empower a District Court to grant probation after the expiration of the term at which its judgment was rendered and after the expiration of the term at which the mandate of an appellate court may have been received, provided the convict has not commenced service of the sentence and is still in the custody of the court awaiting commitment and execution of sentence. Granting probation relates to the execution of the sentence. The test applied in the decisions of the Circuit Courts of Appeals last above cited, in determining the power of the District Court to grant probation, is whether the convict still remains in the custody of the court awaiting commitment and execution of his sentence, regardless of the expiration of the term, and this test seems to reflect the purpose of the Probation Act. Having acquiesced in the decisions in the *Nix Case*, and others like it, consistency seems to require that we make no point of the fact that the term had expired at which the mandate of the appellate court was received.

It seems clearly established that probation may not be granted after commitment in any case. That point disposes of both of the cases at bar, and the question arising in the *Cook case* from the fact that the term at which the mandate was received, as well as the term at which the District Court's judgment had been originally entered, had expired, may not require any consideration by the Court. Cases would be exceptional in which commitment is delayed beyond the expiration of the term at which the affirming mandate of an appellate court is received.

CONCLUSION

We find no provision in the Probation Act which authorizes a District Court to release a defendant on probation after he has commenced to serve his prison sentence, and we submit that it was not the purpose of Congress to confer powers in regard to persons already incarcerated which have not been exercised heretofore by the courts and which are forbidden by established rules of procedure. There is no conflict among the Circuit Courts of Appeals which have passed on the points presented here and we think their interpretation of the statute, which would prevent the release of the defendants in these cases, is the correct one.

The order of the United States District Court in the *Murray Case* should be reversed. The judgment of the Circuit Court of Appeals for the Fifth Circuit in the *Cook Case* should be affirmed.

Respectfully submitted.

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